

## **E. MFSI**

MFSI argues that the January 16, 1997 Decision in Docket No. 94-10-02 applies to all local exchange traffic passed between SNET and CLECs.<sup>5</sup> MFSI also argues that calls to ISPs are simple local calls and fall within the category of local exchange traffic governed by Docket No. 94-10-02. Similar to the other participants, MFSI asserts that the FCC has repeatedly affirmed ISP rights to employ local exchange services to connect to the PSN. According to MFSI, the local call to an ISP local exchange service provider is a separate and distinguishable transmission from any subsequent Internet connection enabled by the ISP in which the FCC has considered to be the interstate portion of an ISP's business. MFSI Comments, pp. 3 and 4.

Citing the recent FCC orders in CC Docket No. 96-262, In the Matter of Access Charge Reform, released on May 16, 1997 (Access Charge Order) and CC Docket No. 96-45 In the Matter of Federal-State Joint Board on Universal Service, released on May 8, 1997 (Universal Service Order), MFSI claims that the FCC affirms these conclusions. In particular, the FCC has declined to allow LECs to assess interstate access charges on ISPs (Access Charge Order) and has also determined that Internet access consists of severable components: the connection to the ISP via access to the PSN and the information service subsequently provided by the ISP (Universal Service Order). MFSI further asserts that the fact that SNET charges its own customers local rates for traffic to ISPs and classifies that traffic as local for purposes of interstate separations is strong evidence that SNET considers such traffic to be local and eligible for reciprocal compensation. MFSI posits that the untenable nature of SNET's position is underscored by the fact that if such traffic were deemed interstate instead of local, SNET could not carry it. MFSI Comments, pp. 6 and 7.

Additionally, MFSI notes that SNET's position has been rejected by six other state regulatory agencies.<sup>6</sup> MFSI concludes that calls to ISPs are not interstate traffic and therefore fall within the scope of the Department's resolution of reciprocal compensation arrangements in Docket No. 94-10-02. MFSI Comments, p. 8.

Lastly, MFSI argues that since SNET controls most of the originating traffic within its territory, exempting calls to ISPs from the reciprocal compensation arrangements would force MFSI and other new entrants to terminate these calls without compensation. MFSI claims that if this were to occur, it would be financial suicide for CLECs to furnish service to an ISP, since providing that service would result in uncompensated termination costs. MFSI also claims that in the end, SNET would have a de facto monopoly over ISP end users, something that was not intended by §251(b)(5) of the 1996 Telecom Act or by §§16-247a-g of the Conn. Gen. Stat. MFSI Comments, p. 12.

## **F. TCG**

<sup>5</sup> SNET disagrees. According to SNET, ISP traffic is not simple local traffic. SNET argues that telephone calls to ISPs do not terminate in the LATA where the ISP's facilities and data bases are located. Rather, these calls are carried over the Internet across LATA and state boundaries and, therefore, are interstate in nature. SNET Reply Comments, p. 2.

<sup>6</sup> The states of Arizona, Colorado, Minnesota, New York, Oregon and Washington all have declined to treat ISP traffic any differently than other local traffic.

TCG states that this issue was already addressed by several state commissions and they have all concluded that local calls to ISPs are subject to reciprocal compensation arrangements. TCG claims that some states - Oregon, Washington, Minnesota and Arizona - have concluded in arbitration proceedings before their respective commissions that CLEC/LEC interconnection agreements must treat local calls to ISPs like any other local traffic subject to mutual compensation. TCG Comments, pp. 2 and 3.

TCG argues that the mutual compensation arrangements adopted by the Department in Docket No. 94-10-02 apply to ISP traffic. Similar to MFSI, TCG maintains that for purposes of reciprocal compensation, ISP traffic is local in nature because it originates and terminates between two end users, the LEC end user (an ISP customer) and the ISP itself within a local calling area. Additionally, TCG cites the Access Charge and Universal Service Orders, wherein the FCC has indicated that intrastate local rates are applied to Internet calls regardless of whether or how the information is enhanced or transmitted by the ISP. TCG also maintains that the nature of the ISP's provision of enhanced service does not affect and is not relevant to the jurisdictional nature of the local call carried by the LEC to the CLEC to the ISP. According to TCG, because this traffic is local, then it should be subject to reciprocal compensation arrangements.

TCG also argues that the local caller pays charges to the originating carrier and the originating carrier must compensate the terminating carrier for completing the call. TCG asserts that SNET seeks to evade this requirement under the 1996 Telcom Act and that the relationship between itself and SNET in completing calls placed to an ISP fits the circumstances under which reciprocal compensation must apply. TCG contends that irrespective of whether a CLEC or SNET provides the local service to the ISP: 1) the ISP's customer still dials a conventional local number to reach the ISP; 2) the call is then routed to the ISP's premises by means of SNET or CLEC local service; and 3) the call is rated by SNET. TCG also contends that, pursuant to §251 of the 1996 Telcom Act and the FCC's First Report and Order, it is entitled to reciprocal compensation for terminating such traffic. The above can be found in TCG Comments, pp. 8, 10-13.

Finally, TCG claims that it has established prices for the trunking arrangements purchased by ISPs that are intended to recover TCG's cost to provide the service. TCG also claims that it incurs additional costs associated with the receipt of traffic from SNET and with processing these calls placed by SNET's customers. TCG states that these costs are primarily associated with the trunking arrangements and switch ports TCG must utilize to receive this traffic. TCG concludes that it is appropriate to require SNET to compensate TCG for the trunking and port costs associated with transport and termination of calls from SNET's customers and that the existing reciprocal compensation framework is adequate to do that task. TCG Comments, p. 13.

#### IV. DEPARTMENT ANALYSIS

SNET has requested that the Department issue a Declaratory Ruling that its Decision in Docket No. 94-10-02 governing mutual compensation does not apply to ISP traffic. Mutual compensation refers to the charges paid to one facilities provider by another for the completion or termination of local calls on the provider's network that did not originate the call. Mutual compensation has been further defined as the means of allowing each network participant to be compensated fairly for the use of its network to complete a local call originating on another provider's network. January 17, 1996 Decision in Docket No. 94-10-02, p. 57. In the January 17, 1996 Decision, the Department also limited the application of mutual compensation to the termination of local traffic and did not permit the incumbent provider to dictate the definition of "local service" for these purposes. Id., p. 71.

While SNET may not be dictating the definition of local service, the Company appears to be attempting to dictate the terms and conditions under which mutual compensation would apply beyond those provided for in the January 17, 1996 Decision in Docket No. 94-10-02. However, as evidenced by the comments submitted by the other participants in this proceeding, the overwhelming opinion is that local calls to ISPs should be subject to mutual compensation. The Department concurs.

ISPs are business local exchange customers that purchase service from SNET, use the network in a similar manner to the Company's other end users and, therefore, should not be treated any differently than other business local exchange customers. Overall, ISP traffic consists of both originating and terminating traffic similar to other end user customers. The basic operating basis of an ISP is the exchange of information between itself and its own customers. In that respect, local traffic will flow in both directions between the SNET end user and the actual Internet service provider supplying the information. The Department considers calls originating and terminating between these customers (ISPs and other SNET customers) within the same local calling area to be local, and, therefore, should be subject to the mutual compensation arrangements adopted in the Plan. This is consistent with the FCC's position that ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries. Access Charge Order ¶342.

The Department also concurs with the FCC in that Internet access is composed of various components including the local voice grade connection to the PSN to which an ISP subscribes and the information service actually provided to the end user by the ISP. In its Access Charge Order, the FCC indicated that Internet access includes the network transmission component (the connection over an LEC network from a subscriber to an ISP) and the underlying information service. In its Access Charge Order, the FCC also stated that voice grade access to the PSN enabled customer access to an ISP and, ultimately, the Internet. Access Charge Order ¶83. In the opinion of the Department, it is the local connection component and the traffic carried over it that should be subject to mutual compensation. Subscription of a local voice grade connection to the PSN by ISPs, as well as its use of these connections, is no different than those subscribed to and utilized by other SNET business and residential customers. The Department finds that any traffic originating and terminating in the local calling area carried over these connections should

be subject to compensation as outlined in the Plan. Not applying the Plan's mutual compensation arrangements to this traffic would discriminate against these users and violate the 1996 Telcom Act and Conn. Gen. Stat. §16-247a. The fact that the Plan requires that compensation be paid for all local traffic carried over the LEC and CLEC networks does not, and should not, depend on the usage characteristics of a specific end user. Therefore, ISP traffic should be subject to mutual compensation.

Additionally, the Department is not persuaded by SNET's claim that it will be required to purchase additional interconnect trunks to the CLEC switches to accommodate the ISP traffic and be required to pay additional compensation resulting from the terminating traffic that would be carried. SNET's common carrier duties require it to install trunking facilities as needed. These facilities will more than likely be used by SNET for its own Internet business as well as the installation and increased use of second lines by its own end user customers. SNET has not substantiated its claim that purchase of additional trunking is required due to its carriage of ISP traffic.

The Department also looks to the experience of other states in addressing the issue of reciprocal compensation for local ISP traffic. The record indicates that Arizona, Colorado, Minnesota, New York, Oregon and Washington have all declined to treat ISP traffic any differently than other local traffic. MFSI Comments, p. 8; TCG Comments, pp. 2 and 3. As indicated above, these states have separately reviewed LEC proposals to deny compensation for ISP traffic. The Department believes its requirement that ISP traffic be subject to the Plan is consistent with these states' decisions.

Lastly, SNET has requested that in the event it is determined that ISP traffic should be subject to the Plan that the Department reconsider its January 17, 1996 Decision in Docket No. 94-10-02 because it would provide CLECs with an unfair competitive advantage. SNET Reply Comments, pp. 7,10. In that Decision, the Department stated that:

... the Department has similarly concluded that any such compensation method approved for adoption by the Department cannot knowingly provide any individual party or group of participants a competitive advantage by unwarranted use of the mutual compensation plan's terms and conditions. If any party subsequently can show harm that has been directly imposed by misuse, abuse or other intended use of the plan to preclude effective competition, the Department will be prepared to formally reconsider its mutual compensation policy.

January 17, 1996 Decision in Docket No. 94-10-02, p. 68.

Local competition and the carriage of traffic by CLECs continues to develop. Through the development of local competition, the exchange of traffic between SNET and CLECs will remain fluid, eventually approaching an equilibrium. The Department does not believe that SNET has satisfactorily demonstrated that it has experienced sufficient harm or that effective competition has been hindered due to the implementation of the Plan. Accordingly, reconsideration of the Plan at this time is not warranted and SNET's request for such is hereby denied. In the event SNET formally requests the Department to

reconsider the Plan at some point in the future, the Company should be prepared to provide detailed evidence that effective competition has been precluded and/or it is experiencing excessive or unjust or irreparable harm as a direct result of the mutual compensation policy.

#### IV. CONCLUSION

There is no difference between an ISP and SNET's other local exchange customers. Traffic carried between SNET's end user customers and ISPs within the same local calling area is local in nature and, therefore, subject to the mutual compensation arrangements outlined in the Department's January 17, 1997 Decision in Docket No. 94-10-02. Neither SNET nor any other telecommunications service provider has presented sufficient evidence of irreparable harm or that effective competition has been hindered due to the Department's mutual compensation policies. Accordingly, SNET's request is hereby denied.

**DOCKET NO. 97-06-22 PETITION OF THE SOUTHERN NEW ENGLAND  
TELEPHONE COMPANY FOR A DECLARATORY  
RULING CONCERNING INTERNET SERVICES  
PROVIDER TRAFFIC**

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

Glenn Arthur

John W. Bettsold, III

**CERTIFICATE OF SERVICE**

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

\_\_\_\_\_  
Robert J. Murphy  
Executive Secretary  
Department of Public Utility Control

\_\_\_\_\_  
Date

## CERTIFICATE OF SERVICE

This is to certify that I have served copies of the foregoing **COMPLAINT OF MFS INTELENET OF GEORGIA, INC.**, upon all parties of record by hand delivering same, this 10th day of October, 1997.

Ms. Terri M. Lyndall, Esq.  
Executive Secretary  
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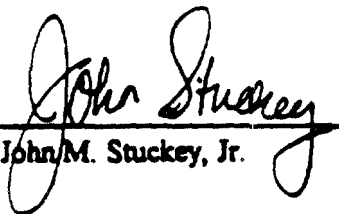
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief.

DOCKET NO. 971478-TP  
ORDER NO. PSC-98-1216-FOF-TP  
ISSUED: September 15, 1998

Complaint of Teleport Communications Group Inc./TCG South Florida against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Section 252 of the Telecommunications Act of 1996, and request for relief.

DOCKET NO. 980184-TP

Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and request for relief.

DOCKET NO. 980495-TP

Complaint by MCI Metro Access Transmission Services, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement by failure to pay compensation for certain local traffic.

DOCKET NO. 980499-TP

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

**FINAL ORDER RESOLVING COMPLAINTS**

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On behalf of the Commission Staff.

### **CASE BACKGROUND**

MFS Communications Company, Inc. (MFS), and BellSouth Telecommunications, Inc. (BellSouth), entered into a Partial Florida Interconnection Agreement pursuant to the Telecommunications Act of 1996 (Act) on August 26, 1996. The Commission approved the Agreement in Order No. PSC-96-1508-FOF-TP, issued December 12, 1996, in Docket No. 961053-TP. The Commission approved an amendment to the Agreement in Order No. PSC-97-0772-FOF-TP, issued July 1, 1997, in Docket No. 970315-TP. On November 12, 1997, WorldCom Technologies, Inc. (WorldCom), filed a Complaint Against BellSouth and Request for Relief, alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by WorldCom's affiliate, MFS, to Internet Service Providers (ISPs). The complaint was assigned Docket No. 971478-TP. BellSouth filed its Answer and Response on December 22, 1997. In Order No. PSC-98-0454-PCO-TP, issued March 31, 1998, the Commission directed that the matter be set for hearing.

Teleport Communications Group, Inc./TCG South Florida (TCG), and BellSouth entered into an Interconnection Agreement pursuant to the Act on July 15, 1996. The Commission approved the Agreement in Order No. PSC-96-1313-FOF-TP, issued October 29, 1996, in Docket No. 960862-TP. On February 4, 1998, TCG filed a Complaint for Enforcement of Section IV.C of its Interconnection Agreement with BellSouth, also alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by TCG to ISPs. The complaint was assigned Docket No. 980184-TP. BellSouth filed its Answer and Response on February 25, 1998.

MCImetro Access Transmission Services, Inc. (MCIm), and BellSouth entered into an Interconnection Agreement pursuant to the Act on April 4, 1997. The Commission approved the Agreement in Order Nos. PSC-97-0723-FOF-TP, issued June 19, 1997, and PSC-97-0723A-FOF-TP, issued June 26, 1997, in Docket No. 960846-TP. On February 23, 1998, MCIm filed a Complaint against BellSouth, which was assigned Docket No. 980281-TP. Among other things, MCIm also alleged in Count 13 that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by MCIm to ISPs. On April 6, 1998, MCIm filed a separate Complaint embodying the complaint set forth in

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Count 13 of the first Complaint. The separate complaint was assigned Docket No. 980499-TP.

Intermedia Communications, Inc. (Intermedia), and BellSouth entered into an interconnection Agreement pursuant to the Act on July 1, 1996. The Commission approved the Agreement in Order No. PSC-96-1236-FOF-TP, issued October 7, 1996, in Docket No. 960769-TP. The Commission approved an amended Agreement in Order No. PSC-97-1617-FOF-TP, issued December 30, 1997, in Docket No. 971230-TP.

On April 6, 1998, Intermedia filed a Complaint against BellSouth alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by Intermedia to ISPs. That complaint was assigned Docket No. 980495-TP.

On March 9, 1998, GTE Florida Incorporated (GTEFL) filed a petition to intervene in this proceeding. By Order No. PSC-98-0476-PCO-TP, we denied GTEFL's petition. Subsequently, on May 6, 1998, GTEFL filed a petition to be permitted to file a brief. We denied that petition at the commencement of the hearing in these complaint dockets.

By Order No. PSC-98-0561-PCO-TP, issued April 21, 1998, the four complaints were consolidated for hearing purposes. The hearing was held on June 11, 1998.

### **DECISION**

This case is about BellSouth's refusal to pay reciprocal compensation for the transport and termination of ISP traffic under the terms of its interconnection agreements with WorldCom, Teleport, Intermedia, and MCI. In a letter dated August 12, 1997, BellSouth notified the complainants that it would not pay compensation for the termination of ISP traffic, because "ISP traffic is jurisdictionally interstate" and "enjoys a unique status, especially [as to] call termination." The case is primarily a contract dispute between the parties, and that is the foundation of our decision below. As TCG stated in its brief, "This is a contract dispute in which the Commission must decide whose meaning is to be given to the term 'Local Traffic' in the Agreement."

Accordingly, in this decision we only address the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the

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parties might reasonably have intended at the time they entered into their contracts. Our decision does not address any generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes.

While there are four complainants in the consolidated case, their arguments contain many common threads. Also, BellSouth's position on each issue is the same, and its brief addresses all four together. For the sake of efficiency, we will address the main themes in our discussion of the WorldCom-BellSouth agreement. We will address the particular language of the other agreements separately.

#### **The WorldCom-BellSouth Agreement**

On August 26, 1996, MFS (now WorldCom) and BellSouth entered into a Partial Interconnection Agreement, which we approved in Order No. PSC-96-1508-FOF-TP. WorldCom witness Ball testified on the pertinent provisions of that Agreement. Section 1.40 of the Agreement defines local traffic as:

[C]alls between two or more Telephone Exchange service users where both Telephone Exchange Services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area [such as EAS]. Local traffic includes traffic types that have been traditionally referred to as "local calling" and as "extended area service (EAS)." All other traffic that originates and terminates between end users within the LATA is toll traffic. In no event shall the Local Traffic area for purposes of local call termination billing between the parties be decreased.

Section 5.8.1 provides that:

Reciprocal Compensation applies for transport and termination of Local Traffic (including EAS and EAS-like traffic) billable by BellSouth or MFS which a Telephone Exchange Service Customer originates on BellSouth's or MFS's network for termination on the other Party's network.

The question presented for decision is, as it is in the other complaints, whether, under the WorldCom - BellSouth Florida Partial Interconnection Agreement, the parties are required to compensate each other for transport and termination of traffic to Internet Service Providers; and if they are, what relief should the Commission grant? The issue is whether the traffic in question, ISP traffic, is local for purposes of the agreements in question.

According to witness Ball, the language of the WorldCom-BellSouth Agreement itself makes it clear that the parties owe each other reciprocal compensation for the traffic in question. He stated that "if a BellSouth customer utilizes a BellSouth telephone exchange service that has a local NPA-NXX and they call a WorldCom customer that buys a WorldCom telephone exchange service that has a WorldCom NPA-NXX, that's local traffic." Witness Ball explained that this is what happens when a BellSouth local customer calls a WorldCom customer that happens to be an ISP. He pointed out that there is no exclusion for any type of customer based on what business the customer happens to be in. Witness Ball noted that where exceptions were needed for certain types of traffic, they were expressly included in the Agreement. He argued that WorldCom understood ISP traffic to be local, and if BellSouth wanted to exclude ISP calls, it was BellSouth's obligation to raise the issue at the time the Agreement was negotiated.

Witness Ball stated that "the Agreement is entirely clear and unambiguous" on the treatment of ISP traffic as local; but if we determine that the Agreement is ambiguous on this point, the ambiguities should be resolved by considering:

- (1) the express language of the Telecommunications Act of 1996;
- (2) relevant rulings, decisions and orders of this Commission;
- (3) relevant rulings, decisions and orders of the FCC interpreting the Act;
- (4) rulings, decisions and orders from other, similarly situated state regulatory agencies; and
- (5) the custom and usage in the industry.

BellSouth witness Hendrix agreed that the contract did not specify whether ISP traffic was included in the definition of local traffic. Witness Hendrix argued, however, that it was WorldCom's obligation to raise the issue in the negotiations. In fact, the record shows that while BellSouth and the complainants all reached a specific agreement on the definition of local traffic to be included in the contracts, none of them raised the particular question of what to do with ISP traffic.

According to BellSouth, all the complainants assumed that BellSouth agreed to include ISP traffic as local. BellSouth asserts that it cannot be forced to pay reciprocal compensation just because it did not "affirmatively except ISP traffic from the definition of 'local traffic'" in negotiating the Agreement. BellSouth argues that the existing law at the time the contracts were negotiated "reflects that it was unreasonable for the Complainants to blithely assume that BellSouth agreed with their proposed treatment of ISP traffic."

It appears to us from our review of the record, however, that BellSouth equally assumed, and implied in its brief and testimony at the hearing, that the complainants in fact knew ISP traffic was interstate in nature. In its brief, BellSouth states that "parties to a contract are presumed to enter into their Agreement with full knowledge of the state of the existing law, which in turn is incorporated into and sheds light on the meaning of the parties' Agreement." BellSouth witness Hendrix asserted that the FCC had explicitly found that ISPs provide interstate services. Therefore, witness Hendrix argued, there was no need for BellSouth to believe ISP traffic would be subject to reciprocal compensation. The result of this misunderstanding, BellSouth asserts, was that the parties never had an express meeting of the minds on the scope of the definition of local traffic.

#### Discussion

Upon review of the language of the agreement, and the evidence and testimony presented at the hearing, we find that the Agreement defines local traffic in such a way that ISP traffic clearly fits the definition. Since ISP traffic is local under the terms of the Agreement, then, a priori, reciprocal compensation for termination is required under Section 5.8 of the Agreement. There is no ambiguity, and there are no specific exceptions for ISP traffic.

Since there is no ambiguity in the language of the agreement, we need not consider any other evidence to determine the parties' obligations under the agreement. Even if there were an ambiguity

in the language of the agreement, however, the other evidence and argument presented at the hearing leads to the same result: the parties intended to include ISP traffic as local traffic for purposes of reciprocal compensation under their agreement.

#### Local vs. Interstate Traffic

The first area to explore is the parties' basis for considering ISP traffic to be jurisdictionally local or interstate.

BellSouth witness Hendrix contended that for reciprocal compensation to apply, "traffic must be jurisdictionally local."

He argued that ISP traffic is not jurisdictionally local, because the FCC "has concluded that enhanced service providers, of which ISPs are a subset, use the local network to provide interstate services." He added that they do so just as facilities-based interexchange carriers and resellers use the local network to provide interstate services. He stated that "[t]he FCC stated in Paragraph 12 in an order dated February 14, 1992, in Docket Number 92-18, that:

Our jurisdiction does not end at the local switch, but continues to the ultimate termination of the call. The key to jurisdiction is the nature of the communication itself, rather than the physical location of the technology.

Further, according to Witness Hendrix, in its April 10, 1998, Report to Congress (CC Docket No. 96-45), "the FCC indicated that it does have jurisdiction to address whether ALECs that serve ISPs are entitled to reciprocal compensation." We will discuss that report in more detail below.

BellSouth does acknowledge in its brief that the "FCC has not held that ISP traffic is local traffic for purposes of the instant dispute before the Commission." Nor has the FCC "held that ISPs are end users for all regulatory purposes." We agree with this assessment. The FCC has not yet decided whether ISP traffic is subject to reciprocal compensation. While the FCC has determined that ISPs provide interstate services, it appears that the FCC may consider these services severable from telecommunications services, as we explain below. No FCC order delineates exactly for what purposes the FCC intends ISP traffic to be considered local. By the same token, the FCC has not said that ISP traffic cannot be considered local for all regulatory purposes. It appears that the FCC has largely been silent on the issue. This leads us to believe

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the FCC intended for the states to exercise jurisdiction over the local service aspects of ISP traffic, unless and until the FCC decided otherwise. Even Witness Hendrix agreed that the FCC intended ISP traffic to be treated as though local. He did not expound on what exactly that meant.

BellSouth contends in its brief that there is no dispute that an Internet transmission may simultaneously be interstate, international and intrastate. BellSouth also contends that the issue should be resolved in pending proceedings before the FCC. Those proceedings include one the FCC initiated in response to a June 29, 1997, letter from the Association for Local Telecommunications Services (ALTS). ALTS requested clarification from the FCC that ISP traffic is within the FCC's exclusive jurisdiction. ALTS has also asked the FCC for a ruling on the treatment of ISP traffic as local.

Regardless of what the FCC ultimately decides, it has not decided anything yet, and we are concerned here with an existing interconnection agreement, executed by the parties in 1996. Our finding that ISP traffic should be treated as local for purposes of the subject interconnection agreement is consistent with the FCC's treatment of ISP traffic at the time the agreement was executed, all pending jurisdictional issues aside.

### Termination

In its brief, BellSouth places considerable emphasis on the point of termination for a call. The basic question is whether or not ISP traffic terminates at the ALEC premises. Witness Hendrix testified that "call termination does not occur when an ALEC, serving as a conduit, places itself between BellSouth and an ISP."

"[I]f an ALEC puts itself in between BellSouth's end office and the Internet service provider, it is acting like an intermediate transport carrier or conduit, not a local exchange provider entitled to reciprocal compensation." "Thus, the call from an end user to the ISP only transits through the ISP's local point of presence; it does not terminate there. There is no interruption of the continuous transmission of signals between the end user and the host computers." BellSouth states in its brief that "the jurisdictional boundaries of a communication are determined by its beginning and ending points, and the ending point of a call to an ISP is not the ISP switch, but rather is the database or information source to which the ISP provides access."

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MCIm contends in its brief that BellSouth witness Hendrix' testimony that a call to an ISP terminates not at the local telephone number, but rather at a distant Internet host misunderstands the nature of an Internet call. MCIm witness Martinez contended that the ability of Internet users to visit multiple websites at any number of destinations on a single call is a clear indication that the service provided by an ISP is enhanced service, not telecommunications service. According to MCIm, this does not alter the nature of the local call. While BellSouth would have one believe that the call involved is not a local call, MCIm points out that in the case of a rural customer using an IXC to connect with an ISP, the call "is suddenly two parts again: a long distance call, for which BellSouth can charge access, followed by an enhanced service."

BellSouth argues in its brief that "in interpreting the language of a contract, words referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning." We agree, but it appears to us that BellSouth then chooses to ignore the industry standard definition of the word "termination." The other parties provided several examples of industry definitions on this point.

WorldCom witness Ball stated that "[s]tandard industry practice is that a call is terminated essentially when it's answered; when the customer that is buying the telephone exchange service that has the NPA-NXX answers the call by--whether it's a voice grade phone, if it's a fax machine, an answering machine or, in the case of an ISP, a modem."

TCG witness Kouroupas testified that the standard industry definition of "service termination point" is:

Proceeding from a network toward a user terminal, the last point of service rendered by a commercial carrier under applicable tariffs.... In a switched communications system, the point at which common carrier service ends and user-provided service begins, i.e. the interface point between the communications systems equipment and the user terminal equipment, under applicable tariffs.

Witness Kouroupas further explained that "A call placed over the public switched telecommunications network is considered 'terminated' when it is delivered to the telephone exchange bearing

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the called telephone number." Call termination occurs when a connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, answer supervision is returned, and a call record is generated.

This is the case whether the call is received by a voice grade phone, a fax machine, an answering machine, or in the case of an ISP, a modem. Witness Kouroupas contended that this is a widely accepted industry definition.

MCIm argues in its brief that:

a "telephone call" placed over the public switched telephone network is "terminated" when it is delivered to the telephone exchange service premise bearing the called telephone number... specifically, in its Local Competition Order (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶1040), the FCC defined terminations "for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." MCIm terminates telephone calls to Internet Service Providers on its network. As a communications service, a call is completed at that point, regardless of the identity or status of the called party.

Witness Martinez testified that "[w]hen a BellSouth customer originates a telephone call by dialing that number, the telephone call terminates at the ISP premises, just as any other telephone call terminates when it reaches the premises with the phone number that the end user dialed."

#### Severability

Recent FCC documents have described Internet traffic as calls with two severable parts: a telecommunications service part, and an enhanced service part. In the May 1997 Universal Service Order at ¶789, the FCC stated:

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When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.

In that Report, the FCC also stated that ISPs "generally do not provide telecommunications." (¶¶ 15, 55) WorldCom argues in its brief that:

The FCC's determination that ISPs do not provide telecommunications was mandated by the 1996 Act's express distinction between telecommunications and information services. "Telecommunications" is "The transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. Section 153(48). By contrast, "information services" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. Sec. 153(20)

WorldCom adds that:

[t]he FCC recognized that the 1996 Act's distinction between telecommunications and information services is crucial. The FCC noted that "Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services" despite the appearance from the end user's perspective that it is a single service because it may involve telecommunications components. (Report to Congress, ¶¶56, 58) [Emphasis supplied by WorldCom]

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BellSouth argues that the complainants misinterpret the FCC's decision. BellSouth points out that this passage is only discussing whether or not ISPs should make universal service contributions. That is true; but the passage is nevertheless as significant an indication of how the FCC may view ISP traffic as the passages BellSouth has cited.

In its brief, BellSouth claims that the FCC "specifically repudiated" the two-part theory. BellSouth cites the FCC's Report to Congress, CC Docket No., 96-45, April 10, 1998, ¶220. There the FCC stated:

We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the [FCC], does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider. [emphasis supplied by BellSouth]

BellSouth claims that this means the FCC believes the distinction is "meaningless in the context of the FCC's pending reciprocal compensation decision." The other parties point out, however, that it is not at all clear what the FCC means in this passage. It appears to us that the FCC is talking here about the status of the provider, not about the severability of the telecommunications service from the information service. Indeed, in the same report, the FCC brought up the severability notion, as discussed above.

BellSouth also argues that the severability theory is contradicted by the FCC's description of Internet service in its Non-Accounting Safeguards Order (Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (released Dec. 24, 1996), note 291), where the FCC states:

The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol...to enable information exchange. An

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end user may obtain access to the Internet from an Internet service provider, by using dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in turn, connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites.

BellSouth claims that the significance of this is that calls to ISPs only transit through the ISP's local point of presence. Thus, the call does not terminate there. In support of this conclusion, BellSouth mentions several other services, such as Asynchronous Transfer Mode (ATM) technology, that use packet switching. BellSouth makes the point that the jurisdictional nature of a call is not changed through the conversion from circuit switching to packet switching.

BellSouth also discussed an example where an end user made a long-distance call to access voice mail. In that case the call was an interstate call, and the FCC found that it did not lose that interstate character upon being forwarded to voice mail. Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992), aff'd, Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993). We do not comprehend BellSouth's point. By that logic, if a local call is used to access an information service, it follows that the entire transmission would be local. In yet another case cited by BellSouth, the FCC found that interstate foreign exchange service was interstate service, and thus came under the FCC's jurisdiction.

New York Telephone Co.--Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 FCC 2d 349 (1980). Once again, it is difficult to discern BellSouth's point. We do not find this line of argument at all persuasive.

BellSouth further argues that "[t]he FCC has long held that the jurisdiction of a call is determined not by the physical location of the communications facilities or the type of facilities used, but by the nature of the traffic that flows over those facilities." This, too, is a perplexing argument in light of BellSouth's claims that the distant location of the host accessed over the Internet makes ISP traffic interstate, and that the nature of ISP traffic as either telecommunications or information service is irrelevant.

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As mentioned above, witness Hendrix did admit that "the FCC intended for ISP traffic to be 'treated' as local, regardless of jurisdiction." He emphasized the word treated, and explained that the FCC "did not say that the traffic was local but that the traffic would be treated as local."

#### FPSC Treatment

BellSouth dismisses Commission Order No. 21815, issued September 5, 1989, in Docket No. 880423-TP, Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, as an interim order. In that order, the Commission found that end user access to information service providers, which include Internet service providers, is by local service. In the proceeding, BellSouth's own witness testified that:

[C]onnections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service. (Order 21815, p. 25)

The Commission agreed with BellSouth's witness. The Commission also found that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls terminating at an ISP's location in Florida. BellSouth's position, as stated in the Order, was that:

calls should continue to be viewed as local exchange traffic terminating at the ESP's [Enhanced Service Provider's] location. Connectivity to a point out of state through an ESP should not contaminate the local exchange. (Order, p. 24) (ISPs are a subset of ESPs.)

In this case, Witness Hendrix claimed that Order 21815 was only an interim order that has now been overruled. He could not identify any Commission order establishing a different policy; nor could he specify the FCC order that supposedly overrules the Florida Commission order. Further, and most importantly, BellSouth admitted that this definition had not been changed at the time it entered into its Agreements.

It is clear that the treatment of ISP traffic was an issue long before the parties' Agreement was executed. We found, in Order No. 21815, as discussed above, that such traffic should be

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treated as local. Both WorldCom and BellSouth clearly were aware of this decision, and we presume that they considered it when they entered into their Agreement.

### Intent of Parties

In determining what was the parties' intent when they executed their contract, we may consider circumstances that existed at the time the contract was entered into, and the subsequent actions of the parties. As WorldCom argues in its brief, "the intent of the parties is revealed not just by what is said, but by an analysis of all the facts and circumstances surrounding the disputed issue."

In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953) the Florida Supreme Court cited with favor Contracts, 12 Am.Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language ... Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred ... An interpretation which is just to both parties will be preferred to one which is unjust.

In the construction of a contract, the circumstances in existence at the time the contract was made should be considered in ascertaining the parties' intention. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rehg. den. (Fla. 1951).

What a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rehg. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958).

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As noted above, Section 1.40 of the Agreement defines local traffic. The definition appears to be carefully drawn. Local traffic is said to be calls between two or more service users bearing NPA-NXX designations within the local calling area of the incumbent LEC. It is explained that local traffic includes traffic traditionally referred to as "local calling" and as "EAS." No mention is made of ISP traffic. Therefore, nothing in Section 1.40 sets ISP traffic apart from local traffic. It is further explained that all other traffic that originates and terminates between end users within the LATA is toll traffic.

As evidence of its intent, BellSouth argues that the interpretation of a contract must be one consistent with reason, probability, and the practical aspect of the transaction between the parties. BellSouth contends that it was "economically irrational for it to have agreed to subject ISP traffic to payment of reciprocal compensation." BellSouth claims it "had no rational economic reason to have agreed to pay reciprocal compensation for the ISP traffic, because...such assent would have likely guaranteed that BellSouth would lose money on every customer it serves who subscribed to an ISP served by a complainant."

In an example provided by BellSouth, a BellSouth residential customer subscribes to an ISP that is served by an ALEC. The customer uses the Internet for two hours per day. This usage would generate a reciprocal compensation payment to the ALEC of \$36.00 per month, assuming a 1 cent per minute reciprocal compensation rate. A Miami BellSouth customer pays \$10.65 per month for residential service. Thus, BellSouth would pay \$25.35 per month more to the ALEC than it receives from its customer. BellSouth claims that this unreasonable result is proof that it never intended to include ISP traffic as local for reciprocal compensation purposes.

Not all parties receive reciprocal compensation of 1 cent per minute. The MCI Agreement specifies a rate of \$0.002 per minute, not \$0.01. In this case, using BellSouth's example, the total reciprocal compensation would be \$7.20. MCI points out in its brief that the contract containing the \$0.01 rate is one to which BellSouth agreed. They argue that "[w]hether BellSouth agreed to this rate because they mistakenly thought that a rate five times higher than cost would give it some competitive advantage, or whether BellSouth agreed to it without thinking at all, it is not the Commission's role to protect BellSouth from itself."

In support of its position that ISP traffic was intended to be treated as local in the Agreement, WorldCom points out that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP's customers within the local calling area to connect with the ISP by means of a local call. Such calls are rated and billed as local, not toll.

MCIm also points out that BellSouth treats calls to ISPs that are its customers as local calls. BellSouth also offers its own ISP customers service out of its local exchange tariffs. MCIm asserts that while it treats its own customers one way, BellSouth would have ISP customers of the ALECs treated differently.

Besides BellSouth's treatment of its own ISP customers' traffic, there is nothing in the parties' agreements that addresses the practical aspect of how to measure the traffic. As TCG points out in its brief, BellSouth failed to take any steps to develop a tracking system to separately account for ISP traffic. The TCG contract was entered into in July 1996, but BellSouth did not attempt to identify ISP traffic until May or June of 1997. If the agreement did in fact exclude ISP traffic from the definition of local traffic, and thus the reciprocal compensation provisions of the agreement, it would be necessary to develop a tracking system.

The evidence indicates that the tracking system currently used by BellSouth is based on identifying the seven-digit number associated with an ISP. Absent that, as BellSouth witness Hendrix conceded, BellSouth must rely on estimates.

Intermedia also points out in its brief that:

If ISP traffic is not local as BellSouth contends, it would have been imperative for the parties to develop a system to identify and measure ISP traffic, because there is no ready mechanism in place for tracking local calls to ISPs. The calls at issue are commingled with all other local traffic and are indistinguishable from other local calls.

If BellSouth intended to exclude traffic terminated to ISPs from other local traffic, it would have needed to develop a way to measure traffic that distinguishes such calls from all other types of local calls with long holding times, such as calls to airlines and